

# The Judicial Council

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## **NOTICE**

Pursuant to 28 U.S.C. §§ 332(d)(1) and 372(c)(11), the Judicial Council for the District of Columbia Circuit hereby gives notice of the attached amendments to the Rules of the Judicial Council for the District of Columbia Circuit Governing Complaints of Judicial Misconduct or Disability.

These amendments shall take immediate effect on an interim basis. Absent further notice or action of the Council, these amendments shall take final effect 30 days from the date of this Notice, and shall be applied to all pending and future matters. During this 30-day period, interested persons may submit comments on the amendments to:

Mark J. Langer, Clerk  
United States Court of Appeals for the  
District of Columbia Circuit  
E. Barrett Prettyman United States Courthouse  
Room 5423  
Washington, D.C. 20001

**For the Judicial Council:**

Mark J. Langer, Clerk  
United States Court of Appeals

Issued: April 13, 1998

# The Judicial Council

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**BEFORE:** Chief Judge Edwards, Circuit Judges Wald, Silberman, Williams, Sentelle, Henderson, and Randolph, Chief Judge Johnson, District Judges Hogan, Lamberth, Urbina, and Kollar-Kotelly.

## **ORDER**

It is ordered that the Rules of the Judicial Council for the District of Columbia Circuit Governing Complaints of Judicial Misconduct or Disability be amended in accordance with the attached document.

**For the Judicial Council:**

Mark J. Langer, Clerk  
United States Court of Appeals

Issued: April 13, 1998

*[Existing rule language is shown in plain text, deletions are stricken through, and new language is shaded in gray.]*

## **RULES OF THE JUDICIAL COUNCIL FOR THE DISTRICT OF COLUMBIA CIRCUIT GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT OR DISABILITY**

With amendments recommended by the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders to Reflect the Judicial Discipline and Removal Reform Act of 1990, Public Law No. 101-650, Title IV, Subtitle I.

### **PREFACE TO THE RULES**

Section 372(c) of title 28 of the United States Code provides a way for any person to complain about a federal judge who the person believes "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or "is unable to discharge all the duties of office by reason of mental or physical disability." It also permits the judicial councils of the circuits to adopt rules for the consideration of these complaints. These rules have been adopted under that authority.

Complaints are filed with the Clerk of the Court of Appeals on a form that has been developed for that purpose. Each complaint is referred first to the chief judge of the circuit, who decides whether the complaint raises an issue that should be investigated. (If the complaint is about the chief judge, another judge will make this decision; see rule 18(f)).

The chief judge will dismiss a complaint if it does not properly raise a problem that is appropriate for consideration under section 372(c). The chief judge may also conclude the complaint proceeding if the problem has been corrected or if intervening events have made action on the complaint unnecessary. If the complaint is not disposed of in either of these two ways, the chief judge will appoint a special committee to investigate the complaint. The special committee makes its report to the judicial council of the circuit, which decides what action, if any, should be taken. The judicial council is a body that consists of the chief judge of the circuit, six judges of the court of appeals and six district court judges. The rules provide, in some circumstances, for review of decisions of the chief judge or the judicial council.

These rules were adopted by the Judicial Council of the District of Columbia on June 23, 1988, and amended on April 13, 1992, December 12, 1996, and March 19, 1998. They supersede all interim rules heretofore governing judicial complaint proceedings.

Address all inquiries and filings to Clerk, United States Court of Appeals for the District of Columbia Circuit, Room 5423, E. Barrett Prettyman United States Courthouse, 333 Constitution Avenue, NW, Washington, DC 20001-2866. Telephone: (202) 216-7300 273-0310.

## CHAPTER I. FILING A COMPLAINT

### Rule 1. When to Use the Complaint Procedure

**(a) Purpose of the procedure.** The purpose of the complaint procedure is to improve the administration of justice in the federal courts by taking action when judges have engaged in conduct that does not meet the standards expected of federal judicial officers or are physically or mentally unable to perform their duties. The emphasis of the process is on correction of conditions that interfere with the proper administration of justice in the courts.

**(b) What may be complained about.** The law authorizes complaints about United States circuit judges, district judges, bankruptcy judges, or magistrate judges who have "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or who are "unable to discharge all the duties of office by reason of mental or physical disability."

"Conduct prejudicial to the effective and expeditious administration of the business of the courts" is not a precise term. It includes such things as use of the judge's office to obtain special treatment for friends and relatives, acceptance of bribes, improperly engaging in discussions with lawyers or parties to cases in the absence of representatives of opposing parties, and other abuses of judicial office. It does not include making wrong decisions-- even very wrong decisions--in cases. The law provides that a complaint may be dismissed if it is "directly related to the merits of a decision or procedural ruling."

"Mental or physical disability" may include temporary conditions as well as permanent disability.

**(c) Who may be complained about.** The complaint procedure applies to judges of the United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, and United States magistrate judges. These rules apply, in particular, only to judges of the Court of Appeals for the D.C. Circuit and to district judges, bankruptcy judges, and magistrate judges of federal courts within the circuit.

Complaints about other officials of federal courts should be made to their supervisors in the various courts. If such a complaint cannot be satisfactorily resolved at lower levels, it may be referred to the chief judge of the court in which the official is employed. The circuit executive, whose address is shown below\*, is sometimes able to provide assistance in resolving such complaints.

**(d) Time for filing complaints.** A complaint may be filed at any time. However, complaints should be filed promptly. A complaint may be dismissed if it is filed so long after the events in question that the delay will make fair consideration of the matter impossible. A complaint may also be dismissed if it does not indicate the existence of a current problem with the administration of the business of the courts.

**(e) Limitations on use of the procedure.** The complaint procedure is not intended to

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\* Office of the Circuit Executive, Rm. 4826, **E. Barrett Prettyman** U.S. Courthouse, 333 Constitution Avenue, N.W., Washington, D.C. 20001-2866.

provide a means of obtaining review of a judge's decision or ruling in a case. The judicial council of the circuit, the body that takes action under the complaint procedure, does not have the power to change a decision or ruling. Only a court can do that.

The complaint procedure may not be used to have a judge disqualified from sitting on a particular case. A motion for disqualification should be made in the case.

Also, the complaint procedure may not be used to force a ruling on a particular motion or other matter that has been before the judge too long. A petition for mandamus can sometimes be used for that purpose.

**(f) Abuse of the complaint procedure.** A complainant who has filed vexatious, repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints. After affording the offending complainant an opportunity to show cause in writing why his or her ability to file further complaints should not be limited, the judicial council may restrict or impose conditions upon the complainant's use of the complaint procedure. Upon written request of the complainant, the judicial council may revise or withdraw any restrictions or conditions imposed.

#### COMMENTARY ON RULE 1

[No change.]

### Rule 2. How to File a Complaint

**(a) Form.** Complaints should be filed on the official form for filing complaints in the D.C. Circuit, which is reproduced in the appendix to these rules. Forms may be obtained by writing or telephoning the Office of the Clerk of the Court of Appeals for the D.C. Circuit, **E. Barrett Prettyman** U.S. Courthouse, 333 Constitution Avenue, N.W., Washington, D.C. 20001-2866, Telephone (202) ~~273-0310~~ **216-7300**. Forms also may be picked up in person at the office of the clerk of the court of appeals or any district court or bankruptcy court within the circuit.

**(b) Statement of facts.** A statement should be attached to the complaint form, setting forth with particularity the facts upon which the claim of misconduct or disability is based. The statement should not be longer than five pages (five sides), and the paper size should not be larger than the paper on which the form is printed. Normally, the statement of facts will include--

(1) A statement of what occurred;

(2) The time and place of the occurrence or occurrences;

(3) Any other information that would assist an investigator in checking the facts, such as the presence of a court reporter or other witnesses and their names and addresses.

**(c) Legibility.** Complaints should be typewritten if possible. If not typewritten, they must be legible.

**(d) Submission of documents.** Documents such as excerpts from transcripts may be

submitted as evidence of the alleged misconduct; if they are, the statement of facts should refer to the specific pages in the documents on which relevant material appears.

**(e) Number of copies.** If the complaint is about a single judge of the court of appeals, three copies of the complaint form, the statement of facts, and any documents submitted must be filed. If it is about a single district judge or magistrate judge, four copies must be filed; if about a single bankruptcy judge, five copies. If the complaint is about more than one judge, enough copies must be filed to provide one for the clerk of the court, one for the chief judge of the circuit, one for each judge complained about, and one for each judge to whom the clerk must send a copy under rule 3(a)(2).

**(f) Signature and oath.** The form must be signed and the truth of the statements verified under oath. As an alternative to taking an oath, the complainant may declare under penalty of perjury that the statements are true. The complainant's address must also be provided.

**(g) Anonymous complaints.** These rules do not provide for anonymous complaints. Any anonymous complaints received by the clerk will be forwarded to the chief judge of the circuit for such action as the chief judge considers appropriate. See rules 2(j) and 20.

**(h) Where to file.** Complaints should be sent to the Clerk, United States Court of Appeals, E. Barrett Prettyman U.S. Courthouse, 333 Constitution Avenue, N.W., Washington, D.C. 20001-2866. The envelope should be marked "Complaint of Misconduct" or "Complaint of Disability." The name of the subject judge should not appear on the envelope.

**(i) No fee required.** There is no filing fee for complaints of misconduct or disability.

**(j) Chief judge's authority to initiate complaint.** In the interest of effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, initiate a complaint under 28 U.S.C. § 372(c)(1) and thereby dispense with the filing of a written complaint. A chief judge who has identified a complaint under this rule will not be considered a complainant and, subject to the second sentence of rule 18(a), will perform all functions assigned to the chief judge under these rules for the determination of complaints filed by a complainant.

## COMMENTARY ON RULE 2

*[No change.]*

### Rule 3. Action by Clerk of Court of Appeals Upon Receipt of a Complaint

*[No change.]*

## CHAPTER II. REVIEW OF A COMPLAINT BY THE CHIEF JUDGE

### Rule 4. Review by the Chief Judge

**(a) Purpose of chief judge's review.** When a complaint in proper form is sent to the chief judge by the clerk's office, the chief judge will review the complaint to determine whether it should be (1) dismissed, (2) concluded on the ground that corrective action has been taken, (3) concluded because intervening events have made action on the complaint no longer necessary, or (4) referred to a special committee.

**(b) Inquiry by chief judge.** In determining what action to take, the chief judge may conduct a limited inquiry for the purpose of determining (1) whether appropriate corrective action has been or can be taken without the necessity for a formal investigation, (2) whether intervening events have made action on the complaint unnecessary, and (3) whether the facts stated in the complaint are either plainly untrue or are incapable of being established through investigation. For this purpose, the chief judge may request the subject judge to file a written response to the complaint. The chief judge may also communicate orally or in writing with the complainant, the subject judge, and other people who may have knowledge of the matter, and may review any transcripts or other relevant documents. The chief judge will not undertake to make findings of fact about any matter that is reasonably in dispute.

**(c) Dismissal.** A complaint will be dismissed if the chief judge concludes --

(1) that the claimed conduct, even if the claim is true, is not "conduct prejudicial to the effective and expeditious administration of the business of the courts" and does not indicate a mental or physical disability resulting in inability to discharge the duties of office;

(2) that the complaint is directly related to the merits of a decision or procedural ruling;

(3) that the complaint is frivolous, a term that includes making charges that are wholly unsupported **or alleging facts that are shown by a limited inquiry pursuant to rule 4(b) to be either plainly untrue or incapable of being established through investigation;** or

(4) that, under the statute, the complaint is otherwise not appropriate for consideration.

**(d) Corrective action.** The complaint proceeding will be concluded if the chief judge determines that appropriate action has been taken to remedy the problem raised by the complaint or that action on the complaint is no longer necessary because of intervening events.

**(e) Appointment of special committee.** If the complaint is not dismissed or concluded, the chief judge will promptly appoint a special committee, constituted as provided in rule 9, to investigate the complaint and make recommendations to the judicial council. However, ordinarily a special committee will not be appointed until the subject judge has been invited to respond to the complaint and has been allowed a reasonable time to do so. In the discretion of the chief judge, separate complaints may be joined and assigned to a single special committee; similarly, a single complaint about more than one judge may be severed and more than one special committee appointed.

**(f) Notice of chief judge's action.**

(1) If the complaint is dismissed or the proceeding concluded on the basis of corrective action taken or because intervening events have made action on the complaint unnecessary, the chief judge will prepare a supporting memorandum that sets forth the allegations of the complaint and the reasons for the disposition. The memorandum will not include the name of the complainant or of the subject judge. The order and the supporting memorandum will be provided to the complainant, the judge, and any judge entitled to receive a copy of the complaint pursuant to rule 3(a)(2). The complainant will be notified of the right to petition the judicial council for review of the decision and of the deadline for filing a petition.

(2) If a special committee is appointed, the chief judge will notify the complainant, the subject judge, and any judge entitled to receive a copy of the complaint pursuant to rule 3(a)(2), that the matter has been referred and will inform them of the committee membership.

**(g) Public availability of chief judge's decision.** Materials related to the chief judge's decision will be made public at the time and in the manner set forth in rule 17.

**(h) Report to judicial council.** The chief judge will from time to time report to the judicial council of the circuit on actions taken under this rule.

**(i) Allegations of criminal conduct.** If a chief judge dismisses, solely for lack of jurisdiction under 28 U.S.C. § 372(c), non-frivolous allegations of criminal conduct by a judge, the chief judge's order of dismissal shall inform the complainant that the dismissal does not prevent complainant from bringing any allegation of criminal conduct to the attention of appropriate federal or state criminal authorities. If, in this situation, the allegations of criminal conduct were originally referred to the circuit by a Congressional committee or member of Congress, the chief judge — if no petition for review of the dismissal is filed within the thirty-day period specified by rule 6(a) — shall notify the Congressional committee or member that the Judiciary has concluded that it lacks jurisdiction under § 372(c).

## COMMENTARY ON RULE 4

### Expeditious Review

The statute requires the chief judge to review a complaint "expeditiously." It should be a rare case in which more than 90 days are permitted to elapse from the filing of the complaint to the chief judge's action on it.

### Purpose of Chief Judge's Review

Although the statute permits the chief judge to conclude the proceeding "if he finds that" appropriate corrective action has been taken, it seems clear that the chief judge, in cases in which a complaint appears to have merit, should make every effort to determine whether it is possible to fashion a remedy without the necessity of appointing a special committee. The formal investigatory procedures are to be regarded as a last resort; the remedial purposes of the statute are on the whole better and more promptly served if an informal solution can be found that will correct the problem giving rise to a complaint. Such informal solution need not be agreed to by the complainant.

### Inquiry by Chief Judge



It seems clear under the statute that the chief judge is not required to act solely on the face of the complaint. The power to conclude a complaint proceeding on the basis that corrective action has been taken implies some power to determine whether the facts alleged are true. *See Report of the National Commission on Judicial Discipline and Removal* (1993), at 102 [hereinafter *National Commission Report*] "such power is necessarily contemplated by the Act's provision authorizing a chief judge to conclude a proceeding"). But the boundary of that power--the point at which a chief judge invades the territory reserved for special committees--is unclear. Rule 4(b) addresses that issue by stating that the chief judge may conduct a limited inquiry to determine whether the facts of the complaint are "either plainly untrue or are incapable of being established through investigation," and that the chief judge "will not undertake to make findings of fact about any matter that is reasonably in dispute." *See id.* (rule 4(b) "represents a sensible accommodation of the policies and interests that are implicated"). Admittedly, this formulation may do little more than state the obvious, leaving the most difficult questions unanswered. A number of examples, all but the first based on actual cases, illustrate the problem:

(1) The complainant alleges an impropriety and asserts that he knows of it because his voices told him. It would appear clearly appropriate to treat such a complaint as frivolous.

(2) The complainant alleges an impropriety and asserts that he knows of it because it was observed and reported to him by a person whom the complainant is not free to identify. The judge denies that the event occurred. In some instances similar to this, chief judges have dismissed the complaint, reasoning that there was nothing to fuel an investigation. The statutory basis for dismissal does not seem strong, but the result seems eminently sensible unless one thinks that it is appropriate for a special committee to subpoena the complainant and insist on the identity of the source. On balance, it would appear that the complaint should be dismissed as frivolous in such a case.

(3) The complainant alleges an impropriety and asserts that he knows of it because it was observed and reported to him by a person who is identified. The judge denies that the event occurred. When contacted, the source also denies it. In such a case, the chief judge's proper course of action may well turn on whether the source had any role in the allegedly improper conduct. If the complaint were based on a lawyer's statement that he had an improper ex parte contact with a judge, the lawyer's denial of the impropriety might not be taken as wholly persuasive, and it seems appropriate to conclude that a real factual issue is raised. On the other hand, if the complaint quoted a disinterested third party and the disinterested party denied that the statement had been made, there would not appear to be any value in opening a formal investigation. In such a case, it would seem appropriate to dismiss the complaint as frivolous on the basis that there is no support for the allegation of misconduct.

(4) The complainant alleges an impropriety and alleges that he observed it and there were no other witnesses; the judge denies that the event occurred. This situation presents the possibility of a simple credibility conflict. Unless the complainant's allegations are wholly implausible, it would appear that a special committee must be appointed because there is a factual question that is reasonably in dispute.

## Grounds for Dismissal of Complaints

It is accepted practice in many circuits to dismiss as "frivolous" under 28 U.S.C. § 372(c)(3)(A)(iii) a complaint that is shown to be unfounded by the chief judge's limited inquiry pursuant to rule 4(b). The term "frivolous," however, may be more commonly understood by complainants to refer to complaints that contain insufficient factual allegations to warrant inquiry, as opposed to complaints adequate on their face that are found clearly unsupported after a limited inquiry. A statement that a dismissal is for frivolousness, therefore, "could readily be misunderstood as an indication that the chief judge did not take the complainant's allegations seriously. This kind of misperception might prove particularly unfortunate where a complaint raises sensitive . . . allegations (for example, of ethnic or gender bias) that are found unsupported after inquiry." *National Commission Report* at 98. To avoid such misunderstanding, the chief judge may indicate in the order of dismissal that the complaint, while not inadequate on its face, has been shown by a limited inquiry pursuant to rule 4(b) to be plainly untrue or incapable of being established through investigation.

Rule 4(c)(4) provides that a complaint may be dismissed as "otherwise not appropriate for consideration." This language is intended to accommodate dismissals of complaints for reasons such as untimeliness (see rule 1(d)) or mootness.

## Opportunity of Judge to Respond

Rule 4(e) states that a judge will ordinarily be invited to respond to the complaint before a special committee is appointed.

Judges, of course, receive copies of complaints at the same time that they are referred to the chief judge, and they are free to volunteer responses to them. Under rule 4(b), the chief judge may request a response if it is thought necessary. However, many complaints are clear candidates for dismissal even if their allegations are accepted as true, and there is no need for the subject judge to devote time to a defense. By stating that a special committee will not ordinarily be appointed unless an invitation to respond has been issued by the chief judge, the rule should encourage officials not to respond unnecessarily. **In the absence of a request and showing of good cause for confidentiality, a copy of any response by a subject judge will be forwarded to the complainant.**

## Notification to Complainant and Judge

Section 372(c)(3) requires that the order dismissing a complaint or concluding the proceeding contain a statement of reasons and that a copy of the order be sent to the complainant. It appears that in most circuits it is the practice to prepare a formal order disposing of the complaint and a separate memorandum of reasons. When complaints are disposed of by the chief judge, the statutory purposes are best served by providing the complainant with a relatively expansive explanation.

Rule 4(f) also provides that the complainant will be notified, in the case of a disposition by the chief judge, of the right to petition the judicial council for review.

## Allegations of Criminal Conduct

**In the course of implementing § 372(c), some circuits have ruled that certain instances of**

alleged criminal conduct did not fall within the definition of misconduct set out in 28 U.S.C. § 372(c)(1), *i.e.*, "conduct prejudicial to the effective and expeditious administration of the business of the courts." Generally speaking, the rationale of these rulings is that there is some range of purely personal behavior of the judge -- in some conceivable circumstances even criminal behavior -- that has so little relationship to the performance of judicial duties as to be not cognizable under § 372(c). These rulings raise the concern that dismissal by a circuit, solely on jurisdictional grounds, of non-frivolous allegations of criminal conduct -- without at least informing the complainant that he or she may bring those allegations to the attention of criminal authorities -- entails a risk that no one will undertake whatever investigation of those allegations may be appropriate. Actual criminal conduct might then go unpunished. Rule 4(i) would resolve this problem by requiring a chief judge in that situation to inform the complainant that the dismissal does not prevent the complainant from bringing any allegation of criminal conduct to the attention of appropriate federal or state criminal authorities. If the allegations were originally referred to the circuit by a Congressional committee or member of Congress, the chief judge shall also notify the Congressional committee or member that the Judiciary has concluded that it lacks jurisdiction under § 372(c). Rule 14(k) imposes similar requirements for a judicial council's dismissal, solely on jurisdictional grounds, of a complaint alleging criminal conduct.

## CHAPTER III. REVIEW OF CHIEF JUDGE'S DISPOSITION OF A COMPLAINT

### Rule 5. Petition for Review of Chief Judge's Disposition

*[No change.]*

### Rule 6. How to Petition for Review of a Disposition by the Chief Judge

(a) **Time.** A petition for review must be received in the office of the clerk of the court of appeals within 30 days of the date of the clerk's letter to the complainant transmitting the chief judge's order.

(b) **Form.** A petition should be in the form of a letter, addressed to the clerk of the court of appeals, beginning "I hereby petition the judicial council for review of the chief judge's order ...." There is no need to enclose a copy of the original complaint.

(c) **Legibility.** Petitions should be typewritten if possible. If not typewritten, they must be legible.

(d) **Number of copies.** Only an original is required.

(e) **Statement of grounds for petition.** The letter should set forth a brief statement of the reasons why the petitioner believes that the chief judge should not have dismissed the complaint or concluded the proceeding. It should not repeat the complaint; the complaint will be available to members of the circuit council considering the petition.

(f) **Signature.** The letter must be signed.

(g) **Where to file.** Petition letters should be sent to the Clerk, United States Court of Appeals, **E. Barrett Prettyman** U.S. Courthouse, 333 Constitution Avenue, N.W., Washington, D.C. 20001-2866. The envelope should be marked "Misconduct Petition" or "Disability Petition." The name of the subject judge should not appear on the envelope.

(h) **No fee required.** There is no fee for filing a petition under this procedure.

#### COMMENTARY ON RULE 6

*[No change.]*

### Rule 7. Action by Clerk of Court of Appeals Upon Receipt of a Petition for Review

*[No change.]*

### Rule 8. Review by the Judicial Council of a Chief Judge's Order

*[No change.]*

## **CHAPTER IV. INVESTIGATION AND RECOMMENDATION BY SPECIAL COMMITTEE**

### **Rule 9. Special Committee**

*[No change.]*

### **Rule 10. Conduct of an Investigation**

*[No change.]*

### **Rule 11. Conduct of Hearings by Special Committee**

*[No change.]*

### **Rule 12. Rights of Judge in Investigation**

*[No change.]*

### **Rule 13. Rights of Complainant in Investigation**

*[No change.]*

## **CHAPTER V. JUDICIAL COUNCIL CONSIDERATION OF RECOMMENDATIONS OF SPECIAL COMMITTEE**

### **Rule 14. Action by Judicial Council**

**(a) Purpose of judicial council consideration.** After receipt of a report of a special committee, the judicial council will determine whether to dismiss the complaint, conclude the proceeding on the ground that corrective action has been taken or that intervening events make action unnecessary, refer the complaint to the Judicial Conference of the United States, or order corrective action.

**(b) Basis of council action.** Subject to the rights of the judge to submit argument to the council as provided in rule 15(a), the council may take action on the basis of the report of the special committee and the record of any hearings held. If the council finds that the report and record provide an inadequate basis for decision, it may (1) order further investigation and a further report by the special committee or (2) conduct such additional investigation as it deems appropriate.

**(c) Dismissal.** The council will dismiss a complaint if it concludes that --

(1) the claimed conduct, even if the claim is true, is not "conduct prejudicial to the effective and expeditious administration of the business of the courts" and does not indicate a mental or physical disability resulting in an inability to discharge the duties of office;

(2) the complaint is directly related to the merits of a decision or procedural ruling;

(3) the facts on which the complaint is based have not been demonstrated; or

(4) the complaint is otherwise not appropriate for consideration under the statute.

**(d) Conclusion of the proceeding on the basis of corrective action taken.** The council will conclude the complaint proceeding if it determines that appropriate action has already been taken to remedy the problem identified in the complaint, or that intervening events make such action unnecessary.

**(e) Referral to Judicial Conference of the United States.** The judicial council may, in its discretion, refer a complaint to the Judicial Conference of the United States with the council's recommendations for action. It is required to refer such a complaint to the Judicial Conference of the United States if the council determines that a circuit judge or district judge may have engaged in conduct that --

(1) might constitute ground for impeachment; or

(2) in the interest of justice, is not amenable to resolution by the judicial council.

**(f) Order of corrective action.** If the complaint is not disposed of under paragraphs (c) through (e) of this rule, the judicial council will take other action to assure the effective and expeditious administration of the business of the courts. Such action may include, among other measures --

(1) Censuring or reprimanding the judge, either by private communication or by public announcement;

(2) Ordering that, for a fixed temporary period, no new cases be assigned to the judge;

(3) In the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the council, including the initiation of removal proceedings pursuant to 28 U.S.C. § 631(i);

(4) In the case of a bankruptcy judge, removing the judge from office pursuant to 28 U.S.C. § 152;

(5) In the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length-of-service requirements will be waived;

(6) In the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge under 28 U.S.C. § 372(b) so that an additional judge may be appointed.

**(g) Combination of actions.** Referral of a complaint to the Judicial Conference of the United States under paragraph (e) or to a district court under paragraph (f)(3) of this rule will not preclude the council from simultaneously taking such other action under paragraph (f) as is within its power.

**(h) Recommendation about fees.** Upon the request of a judge whose conduct is the subject of a complaint, the judicial council may, if the complaint has been finally dismissed, recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge during the investigation, which would not have been incurred but for the requirements of 28 U.S.C. § 372(c) and these rules.

**(i) Notice of action of judicial council.** Council action will be by written order. Unless the council finds that, for extraordinary reasons, it would be contrary to the interests of justice, the order will be accompanied by a memorandum setting forth the factual determinations on which the order is based and the reasons for the council action. The memorandum will not include the name of the complainant or of the subject judge. The order and the supporting memorandum will be provided to the complainant, the judge, and any judge entitled to receive a copy of the complaint pursuant to rule 3(a)(2). However, if the complaint has been referred to the Judicial Conference of the United States pursuant to paragraph (e) of this rule and the council determines that disclosure would be contrary to the interests of justice, such disclosure need not be made. The complainant and the judge will be notified of any right to seek review of the judicial council's decision by the Judicial Conference of the United States and of the procedure for filing a petition for review.

**(j) Public availability of council action.** Materials related to the council's action will be made public at the time and in the manner set forth in rule 17.

**(k) Allegations of criminal conduct.** If a judicial council dismisses, solely for lack of jurisdiction under 28 U.S.C. § 372(c), non-frivolous allegations of criminal conduct by a judge, the judicial council's order of dismissal shall inform the complainant that the dismissal does not prevent the complainant from bringing any allegation of criminal conduct to the attention of appropriate federal or state criminal authorities. If, in this situation, the allegations of criminal conduct were

originally referred to the circuit by a Congressional committee or member of Congress, the judicial council -- if no petition for review of the dismissal by the Judicial Conference lies under 28 U.S.C. § 372(c)(10), or if no petition for review is filed within the thirty-day period specified by rule 17(d) -- shall notify the Congressional committee or member that the Judiciary has concluded that it lacks jurisdiction under § 372(c).

#### **COMMENTARY ON RULE 14**

*[No change.]*

#### **Rule 15. Procedures for Judicial Council Consideration of a Special Committee's Report**

*[No change.]*



## CHAPTER VI. MISCELLANEOUS RULES

### Rule 16. Confidentiality

**(a) General rule.** Consideration of a complaint by the chief judge, a special committee, or the judicial council will be treated as confidential, and information about such consideration will not be disclosed by any judge or employee of the judicial branch or any person who records or transcribes testimony except in accordance with these rules.

**(b) Files.** All files related to complaints of misconduct or disability, whether maintained by the clerk, the chief judge, members of a special committee, members of the judicial council, or staff, and whether or not the complaint was accepted for filing, will be maintained separate and apart from all other files and records, with appropriate security precautions to ensure confidentiality.

**(c) Disclosure in memoranda of reasons.** Memoranda supporting orders of the chief judge or the judicial council, and dissenting opinions or separate statements of members of the council, may contain such information and exhibits as the authors deem appropriate, and such information and exhibits may be made public pursuant to rule 17.

**(d) Availability to Judicial Conference.** In the event that a complaint is referred under rule 14(e) to the Judicial Conference of the United States, the clerk will provide the Judicial Conference with copies of the report of the special committee and any other documents and records that were before the judicial council at the time of its determination. Upon request of the Judicial Conference or its Committee to Review Circuit Council Conduct and Disability Orders, in connection with their consideration of a referred complaint or a petition under 28 U.S.C. § 372(c)(10) for review of a council order, the clerk will furnish any other records related to the investigation.

**(e) Availability to district court.** In the event that the judicial council directs the initiation of proceedings for removal of a magistrate judge under rule 14(f)(3), the clerk will provide the chief judge of the district court copies of the report of the special committee and any other documents and records that were before the judicial council at the time of its determination. Upon request of the chief judge of the district court, the judicial council may authorize release of any other records relating to the investigation.

**(f) Impeachment proceedings.** The judicial council may release to the legislative branch any materials that are believed necessary to an impeachment investigation of a judge or a trial on articles of impeachment.

**(g) Consent of subject judge.** Any materials from the files may be disclosed to any person upon the written consent of both the subject judge and the chief judge of the circuit. **In any disclosure** ~~t~~The chief judge may require that the identity of the complainant, **or of witnesses in an investigation conducted by a special committee or the judicial council** be shielded. ~~in any materials disclosed.~~

**(h) Disclosure by judicial council in special circumstances.** The judicial council may authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that the council concludes that such disclosure is justified by special circumstances and is not prohibited by 28 U.S.C. § 372(c)(14).

**Such disclosure may be made to Judiciary researchers engaged in the study or evaluation of**

experience under 28 U.S.C. § 372(c) and related modes of judicial discipline, but only where such study or evaluation has been specifically approved by the Judicial Conference or by the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders. The judicial council should take appropriate steps (to the extent the Judicial Conference or its Committee has not already done so) to shield the identities of the judge complained against, the complainant, and witnesses from public disclosure, and may impose other appropriate safeguards to protect against the dissemination of confidential information.

**(i) Disclosure by complainant.** A complainant may disclose the fact that the complaint has been filed, and any additional information about the complaint or complaint process in the complainant's possession. A complainant may not disclose information conveyed to the complainant by the chief judge, a special committee, or the council, if such information was conveyed on an express condition that the information would be kept confidential. No conveyance of information shall be made on condition of confidentiality unless the complainant is notified of the condition prior to the conveyance, and provided an opportunity to object, or to decline the information. Such information conveyed to a complainant on condition of confidentiality may be disclosed by the complainant with the authorization of the council obtained pursuant to subsection (h) of this rule. A complainant's communication with counsel is not considered a "disclosure" subject to this rule.

**(j)(i) Disclosure of identity by subject judge.** Nothing in this rule will preclude the subject judge from acknowledging that he or she is the judge or magistrate referred to in documents made public pursuant to rule 17, or from responding to any disclosure made by a complainant.

**(k) Assistance and consultation.** Nothing in this rule precludes the chief judge or judicial council, for purposes of acting on a complaint filed under 28 U.S.C. § 372(c), from seeking the assistance of qualified staff, or from consulting other judges who may be helpful in the process of complaint disposition.

## COMMENTARY ON RULE 16

### Scope of Confidentiality Requirement

Section 372(c)(14) applies a rule of confidentiality to "papers, documents, and records of proceedings related to investigations conducted under this subsection" and states that they shall not be disclosed "by any person in any proceeding," with enumerated exceptions. Three questions arise: Who is bound by the confidentiality rule, what proceedings are subject to the rule, and who is within the circle of people who may have access to information without breaching the rule?

With regard to the first question, rule 16(a) provides that judges, employees of the judicial branch, and people involved in recording proceedings and preparing transcripts are obliged to respect the confidentiality requirement. This of course includes judges who may be the subjects of complaints, *except that a subject judge may respond to a public disclosure made by a complainant.*

The general confidentiality requirement does not apply to complainants, *except to the extent that the information is conveyed to the complainant on an agreed condition of confidentiality.* Complainants should be aware, however, that public disclosure of information regarding a complaint may result in the loss of some or all of the protection the confidentiality requirement is intended to afford complainants themselves.

With regard to the second question, the reference to "investigations" suggests that section 372(c)(14) technically applies only in cases in which a special committee has been appointed.

However, rule 16(a) applies the rule of confidentiality more broadly, covering consideration of a complaint at any stage.

With regard to the third question, it seems clear that there is no barrier of confidentiality between a judicial council and the Judicial Conference, and that members of the Judicial Conference or its standing committee may have access to any of the confidential records for use in their consideration of a referred matter or a petition for review. We regard it as implicit that a district court may have similar access if the judicial council orders in response to a complaint that the district court initiate proceedings to remove a magistrate judge from office, and rule 16(e) so provides. It would be absurd if the district court were in this circumstance denied access to the evidence on which the order was based.

The confidentiality requirements do not, of course, prevent the chief judge from "communicat[ing] orally or in writing with . . . people who may have knowledge of the matter," rule 4(d), as part of a limited inquiry conducted by the chief judge under that rule.

In addition, we find it implicit that chief judges and judicial councils may seek staff assistance or consult with other judges who may be helpful in the process of complaint disposition. Rule 16(k) provides that the confidentiality requirement does not preclude this. *See National Commission Report* at 103 (finding that "[t]he Act, including its provision on confidentiality, does not constitute a barrier to such assistance or consultation"). The chief judge, for example, may properly seek the advice and assistance of another judge whom the chief judge deems to be in the best position to speak with the judge named in the complaint in an attempt to bring about corrective action to remedy the problem raised in the complaint. As another example, a new chief judge may wish to confer with a predecessor to learn how similar complaints have been handled. In consulting with other judges, of course, the chief judge should disclose information regarding the complaint only to the extent the chief judge deems necessary under the circumstances.

On the other hand, the statute makes it clear that there is a barrier of confidentiality between the judicial branch and the legislative; it provides, as an exception to the rule of confidentiality, that material is to be disclosed to Congress only if it is "believed necessary to an impeachment investigation or trial of a judge under article I."

### **Exceptions to Confidentiality Rule**

With regard to the exception for impeachment proceedings, rule 16(f) tracks the statutory language and deliberately preserves the ambiguity about who must believe that disclosure is necessary to an impeachment investigation or trial. There is some possibility of conflict between the legislative and judicial branches about this issue. It may never arise in fact and it does not seem appropriate to try to resolve it in advance by rule.

Another exception to the rule of confidentiality is provided by section 372(c)(14)(B), which states that confidential materials may be disclosed if authorized in writing by the subject judge and by the chief judge of the circuit.

Rule 16 also recognizes that there must be some implicit exceptions to the confidentiality requirement. For example, 28 U.S.C. § 372(c)(15) requires that certain orders and the reasons for them shall be made public; it would be a barren collection of reasons that could not refer to the evidence. Rule 16(c) thus makes it explicit that memoranda supporting chief judge and council orders, as well as dissenting opinions and separate statements, may contain references to information

that would otherwise be confidential and that such information may be made public.

Rule 16(h) permits disclosure of additional information by order of the council in circumstances not enumerated. Unfortunately, the statutory language does not explicitly authorize exceptions, so many cases will present issues of statutory interpretation. A strong case could be made for disclosure to permit a prosecution for perjury based on testimony given before a special committee. A more difficult case would be presented if a special committee turned up evidence of criminal conduct by a judge and wanted to refer the matter to a grand jury. The rule refers to the statutory prohibition but does not attempt to resolve such questions.

Rule 16(h) specifically permits the judicial council to authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to Judiciary researchers engaged in the study or evaluation of experience under 28 U.S.C. § 372(c) and related modes of judicial discipline. This provision responds to the recommendation of the *National Commission on Judicial Discipline and Removal* that council rules should authorize the "release of information, with appropriate safeguards, to government entities or properly accredited individuals engaged in the study or evaluation of experience under the 1980 Act." *National Commission Report* at 108.

The rule envisions disclosure of information from the official record of complaint proceedings to a limited category of persons for appropriately authorized research purposes only, and with appropriate safeguards to protect individual identities in any published research results that ensue. In authorizing disclosure, the judicial council may refuse to release particular materials whose release would be contrary to the interests of justice, or that constitute purely internal communications. The rule does not envision any disclosure of purely internal communications between judges and their colleagues and staff.

## **Rule 17. Public Availability of Decisions**

[No change.]

## **Rule 18. Disqualification**

**(a) Complainant.** If the complaint is filed by a judge, that judge will be disqualified from participation in any consideration of the complaint except to the extent that these rules provide for participation by a complainant. A chief judge who has identified a complaint under rule 2(j) will not be automatically disqualified from participating in the consideration of the complaint but may consider in his or her discretion whether the circumstances warrant disqualification.

**(b) Judge complained about.** A judge whose conduct is the subject of a complaint will be disqualified from participating in any consideration of the complaint except to the extent that these rules provide for participation by a subject judge.

**(c) Disqualification of chief judge on consideration of a petition for review of a chief judge's order.** If a petition for review of a chief judge's order dismissing a complaint or concluding a proceeding is filed with the judicial council pursuant to rule 5, the chief judge will not participate in the council's consideration of the petition. In such a case, the chief judge may address a written communication to all of the members of the judicial council, with copies provided to the complainant and to the subject judge. The chief judge may not communicate with individual council members about the matter, either orally or in writing.

**(d) Member of special committee not disqualified.** A member of the judicial council who is appointed to a special committee will not be disqualified from participating in council consideration of the committee's report.

**(e) Judge under investigation.** Upon appointment of a special committee, the subject judge will automatically be disqualified from serving on (1) any special committee appointed under rule 4(e), (2) the judicial council of the circuit, (3) the Judicial Conference of the United States, and (4) the Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States. The disqualification will continue until all proceedings regarding the complaint are finally terminated, with no further right of review. The proceedings will be deemed terminated thirty days after the final action of the judicial council if no petition for review has at that time been filed with the Judicial Conference.

**(f) Substitute for disqualified chief judge.** If the chief judge of the circuit is disqualified from participating in consideration of the complaint, the duties and responsibilities of the chief judge under these rules will be assigned to the circuit judge in regular active service who is the most senior in date of commission for those who are not disqualified. **If all circuit judges in regular active service are disqualified, the judicial council may determine whether to refer the complaint to a circuit judge from another circuit pursuant to 28 U.S.C. § 291(a), or whether it is necessary, appropriate, and in the interest of sound judicial administration to permit the chief judge to dispose of the complaint on the merits. Members of the judicial council who are named in the complaint may participate in this determination if necessary to obtain a quorum of the judicial council.**

**(g) Multiple disqualifications on petition for review.**

(1) Whenever the number of council members disqualified from consideration of a petition for review reduces the number of members qualified to fewer than seven, active judges of the court of appeals and district court, not currently serving on the council, shall be designated as temporary members of the council in sufficient numbers to permit at least seven council members to act on the petition.

(2) Designation of temporary members shall be made equally from each court, in order of seniority by date of commission, provided that the judges of the circuit court of appeals shall comprise a majority of the council members (regular and designated) acting on the petition, unless the number of circuit judges qualified to act are insufficient to comprise a majority. In that event, district judges may comprise a majority.

(3) If, after all qualified active judges of the court of appeals and district court have been designated for temporary council membership, the number of council members remains fewer than seven, the Chief Judge of the circuit shall request that the Chief Justice designate, pursuant to 28 U.S.C. §§ 291(a) and 292(d), circuit and district judges of other circuits for temporary assignment to this circuit. The Chief Judge shall indicate that the judges so designated shall serve as temporary

members of the circuit judicial council for purposes of acting on the petition for review, and shall request designation of judges in sufficient number to permit the council to act on the petition with at least seven members.

#### **COMMENTARY ON RULE 18**

*[No change.]*

#### **Rule 19. Withdrawal of Complaints and Petitions for Review**

*[No change.]*

#### **Rule 20. Availability of Other Procedures**

*[No change.]*

#### **Rule 21. Availability of Rules and Forms**

*[No change.]*

#### **Rule 22. Effective Date**

These rules apply to complaints filed on or after **March 19, 1998**, ~~and to all complaints pending as of that date that were filed on or after March 1, 1991~~. The handling of complaints filed before that date will be governed by the rules previously in effect.

#### **Rule 23. Advisory Committee**

*[No change.]*